In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 252

UNIVERSAL MANUFACTURING COMPANY, A CORPORATION, AND REUBEN BERKOWITZ, AND BERTHA BERKOWITZ, INDIVIDUALLY AND AS OFFICERS OF UNIVERSAL MANUFACTURING COMPANY, AND JOSEPH BERKOWITZ, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 23) is reported in 204 F. 2d 272.

JURISDICTION

The decree of the Court of Appeals was entered on June 9, 1953 (R. 23–25). The petition for a writ of certiorari was filed on August 11, 1953.

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The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the interstate sale and distribution of devices which are used by the ultimate purchasers in selling merchandise at retail by means of games of chance constitute unfair acts or practices under Section 5 of the Federal Trade Commission Act.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

DISCUSSION

A complaint issued by the Federal Trade Commission (R. 4) charged petitioners with unfair acts and practices in commerce, in violation of

Section 5 of the Federal Trade Commission Act. The gravamen of the complaint was the interstate distribution of various devices (push cards, punchboards, jar games and spindle games) designed for ultimate use by retail merchants as a means of selling merchandise through the conduct of games of chance. The facts, which are fully admitted, are summarized in the petition (p. 2). The Commission's cease and desist order (R. 20) was affirmed by the Court of Appeals in a brief *per curiam* opinion.

Petitioners state that they have no arguments to urge other than contentions which are raised in a similar case, *Feitler, et al.* v. *Federal Trade Commission,* No. 74, this Term, pending on petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit.* They incorporate by reference the specifications of error and argument advanced by petitioners in that case.

The Federal Trade Commission has previously filed a brief in opposition in No. 74, stating fully its reasons for believing that the petition in that

*The only material difference between the two cases is that petitioners in No. 74, in addition to making various legal arguments concerning the scope of the Commission's powers, urge that they did not obtain a fair hearing. That contention is not open to petitioners in the instant case, since they admitted all material allegations in the complaint and waived a hearing (R. 11).

case should be denied. For the reasons stated in that brief, to which we respectfully refer the Court, we urge that the petition in the instant case should likewise be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
LAWRENCE GOCHBERG,
Special Assistant to the Attorney General.
EARL W. KINTNER,
General Counsel,
Federal Trade Commission.

SEPTEMBER 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

Office-Supreme Court, U.S.
FILED
NOV 3 1953
HAROLD B. WILLEY, Clerk

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Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Petition for Rehearing

J. L. LONDON,
506 Olive,
St. Louis, Missouri,
Attorney for Petitioners.

F. W. JAMES,
9448 Drake Avenue,
Evanston, Illinois,

PHINEAS ROSENBERG,
R. A. Long Bldg.,
Kansas City, Missouri,
Of Counsel.

The Scheffer Press, Inc.—ANdover 3-6850